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COURT OF CRIMINAL APPEALS
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To the Court of Criminal Appeals of Texas

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COURT OF CRIMINAL APPEALS
9/5/2019
DEANA WILLIAMSON, CLERK

The State of Texas, Appellee

v.

John Christopher Foster, Appellant

Appeal from the Texas Court of Appeals
Third District, at Austin
03-17-00669-CR

STATE'S REPLY BRIEF

Margaret Moore
District Attorney
Travis County

Angie Creasy
Assistant District Attorney
State Bar No. 24043613
P.O. Box 1748
Austin, Texas 78767
(512) 854-9400
Fax (512) 854-4810
Angie.Creasy@traviscountytx.gov
AppellateTCDA@traviscountytx.gov

To the Honorable Court of Criminal Appeals:

Now comes the State of Texas and files this brief, and in support thereof, respectfully shows the following:

Additional authority–Appellant's admission to a separate offense does not entitle him to a self-defense instruction on the charged offense.

Appellant denied cutting the victim's scalp, but he argues that he is entitled to a self-defense instruction because he admitted to cutting the victim's chin and hair.

The mere fact that the language in the indictment technically covers two instances of conduct, however, does not mean that each instance is part of the same criminal act for which the defendant is indicted. *Campbell v. State*, 149 S.W.3d 149, 154 (Tex. Crim. App. 2004). Two offenses can appear to be covered by a single indictment and still be two entirely separate offenses. *Id*. The "same offense" means the identical criminal act, not the same offense by name. *Id*. Thus, the court must look at the elements in the indictment as well as the facts and circumstances presented at trial to see if there are two distinct criminal acts and to determine which act is the charged offense. *Id*. at 155.

In *Campbell*, for example, the State presented evidence that Campbell possessed a large quantity of meth in a backpack. Campbell denied possessing this meth, but he admitted to possessing a smaller amount of meth in his car. Campbell argued that his testimony entitled him to a lesser-included offense instruction since the indictment did not specifically allege that the meth was in a backpack. *Id*. at 150-51.

This Court disagreed. Even though the indictment did not specifically allege the backpack, the facts and circumstances presented at trial showed that the State was prosecuting Campbell for the meth in the backpack. Indeed, the State was not even aware of the meth in the car until Campbell testified about it. In any case, the record showed the State was prosecuting Campbell for the meth in the backpack, so his admission to possessing a different amount of meth in his car was a confession to a separate offense, and he was not entitled to a lesser-included offense instruction on it. *Id*. at 155-56.

Appellant's case presents a similar situation. Even though the indictment did not specifically allege the scalp injury, the facts and circumstances presented at trial show that the State was prosecuting Appellant for the scalp injury. Appellant's case is not quite as clear-cut as *Campbell*, since the State was aware of the cuts to the victim's chin here.

Nevertheless, the record shows that the State was prosecuting Appellant for the scalp injury, not the chin cuts. For one thing, the scalp injury was the only injury that constituted "serious bodily injury," as alleged in the indictment. 6RR 96-99, 125-27. There was no evidence that any other injury caused serious bodily injury.

Contrary to Appellant's assertions, it was not a failure on the State's part to prove that the chin cuts caused serious bodily injury. The State never tried to prove such because the State was prosecuting Appellant for the scalp injury, not the chin cuts. The fact that the State did not even attempt to prove up serious bodily injury with respect to any other injury shows that the State was prosecuting Appellant for the scalp injury.

The State's intent to prosecute Appellant for the scalp injury is also shown in the fact that the State abandoned several manner and means that were originally alleged in the indictment, keeping only the ones that applied to the scalp injury.

The State's intent to prosecute Appellant for the scalp injury is shown in its jury argument as well. The State focused on the scalp injury in asking the jury to find that the State proved up the element of serious bodily injury, and to convict Appellant of aggravated assault causing serious bodily injury:

> "[The victim] got up here and tearfully had to look at these photographs where this defendant cut a piece of her head off of the back of it. In State's Exhibit 53 you see the piece of her head still attached to the hair that he cut off. That's serious bodily injury." 7RR 171
>
> "This wound could not be sown (sic) shut. There was no skin to hold these pieces together. If not treated, you heard from two medical professionals that this could lead to infection and cause death. We have serious bodily injury here." 7RR 181-82.
>
> "What message do you want to send to him and to the community about how you feel about domestic violence like this, how you feel about domestic violence where a woman's scalp is removed from her head? Send a message to this defendant and find him guilty for aggravated assault serious bodily injury with a deadly weapon." 7RR 186.

In short, the record shows that the State was prosecuting Appellant for the scalp injury assault. And Appellant is not entitled to a self-defense instruction on this assault because he wholly denied committing this assault.[1]

Appellant contends, however, that he is entitled to a self-defense instruction based on his testimony that he cut the victim's chin and hair in a struggle over the knife.

[1] This denial is not solely predicated on Appellant's testimony that he did not scalp the victim (although that testimony alone is a clear denial). It is also predicated on Appellant's testimony that the victim caused the scalp injury herself; that she did so while he was busy packing a bag to leave, so there is no possibility he somehow caused the scalp injury at that time; and that the struggle over the knife happened after the scalp injury, so there is no possibility that Appellant caused the scalp injury during the struggle over the knife. 7RR 98-108, 128-29, 144.

But this was a separate offense.[2] The cut to the victim's scalp was a separate act from the cuts to her chin and hair. Not only were they separate acts, but there were numerous events that separated the cut to the victim's scalp and the cuts to her chin and hair.[3] In addition to being separate acts, with numerous intervening events, the assaults also caused different injuries to the victim, both in kind (scalp injury vs. cuts to chin and hair) and in degree (the scalp injury was much more serious).[4]

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[2] *See Ross v. State*, No. 13-08-00286-CR, 2009 Tex. App. LEXIS 6697, at *4-10 (Tex. App.—Corpus Christi Aug. 26, 2009, pet. dismd) (explaining that discrete assaults are separate offenses); *Patterson v. State*, 96 S.W.3d 427, 433-34 (Tex. App.—Austin 2002), aff'd, 152 S.W.3d 88 (Tex. Crim. App. 2004), (stating that, "Those who commit multiple discrete assaults against the same victim are liable for separate prosecution and punishment for every instance of such criminal misconduct"); *Maldonado v. State*, 461 S.W.3d 144, 147 (Tex. Crim. App. 2015) (stating that, for sexual assaults, "Even separate acts that occur close in time can be separate offenses if each involves a separate impulse or intent"); *Landrian v. State*, 268 S.W.3d 532, 540-42 (Tex. Crim. App. 2008) (explaining that aggravated assault causing bodily injury is a result-oriented offense, so a single assault is committed when there is only one injury, as opposed to two distinct injuries or two different types of injuries).

[3] Specifically, Appellant testified that, after the victim cut her own scalp, he made a sexual advance on her, fondling her and trying to pull down her pants; the victim defecated on herself to stop him from having sex with her; Appellant told the victim to give him his phone, and when she did not, he smashed her computer over his knee; the victim attacked him with a knife, cutting him several times; he made the decision to defend himself; then he struggled with the victim for the knife, striking her and pulling her to the ground; and the knife cut the victim's chin during the struggle because she was holding it close to her chin. 7RR 100-107.

[4] Appellant's brief says that a cut to the victim's chin was unclosable. It was actually the scalp wound that was unclosable because so much skin was missing, not the cut on her chin. 6RR 125-26.

In sum, the record shows that Appellant requested a self-defense instruction based on his testimony about a separate offense. Like Campbell, Appellant is not entitled to an instruction concerning this separate offense.

The State asks this Court to hold that a defendant who denies committing the charged offense, but admits to committing a separate offense, is not entitled to a self-defense instruction on the charged offense.

Clarifications and response to Appellant's brief

This case is not about lesser-included offenses. The State should not have referred to the subsequent assault causing cuts to the victim's chin and hair as a "lesser-included offense." It was a separate lesser offense, not a lesser-included offense.

Additionally, this case is not about whether the defendant is required to admit to the State's version of events, or the manner and means alleged in the indictment. It is about whether a defendant who denies committing the charged offense, but admits to committing a separate offense, is entitled to a self-defense instruction on the charged offense. The State's position is that he is not.

Appellant argues that the State should not be able to control the right to a self-defense charge with its charging elections and evidentiary choices. But the State gets to choose which act it prosecutes. In this case, the State

prosecuted Appellant for causing the scalp injury. Appellant was in control of whether he got a self-defense instruction for that act. All he had to do was put on a scintilla of evidence that he caused the scalp injury in self-defense. He did not do that. Instead, he testified that he did not commit the scalp injury at all, and that the victim caused that injury herself. Appellant's own testimony is the reason he is not entitled a self-defense instruction.

Finally, contrary to Appellant's assertions, the State is not seeking to change the standard of review, or to put forth a legal sufficiency argument. Viewing the evidence in the light most favorable to Appellant, there is still no evidence that he committed the charged offense in self-defense. Therefore, Appellant is not entitled to a self-defense instruction.

Prayer

The State asks this Court to reverse the decision of the Court of Appeals and affirm the trial court's judgment.

Respectfully submitted,

Margaret Moore
District Attorney
Travis County

/s/ Angie Creasy
Assistant District Attorney
State Bar No. 24043613
P.O. Box 1748
Austin, Texas 78767

(512) 854-9400
Fax (512) 854-4810
Angie.Creasy@traviscountytx.gov
AppellateTCDA@traviscountytx.gov

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Ken Mahaffey
Attorney for Defendant
P.O. Box 684585
Austin, Texas 78768
Ken_Mahaffey@yahoo.com

Stacey Soule
State Prosecuting Attorney
P.O. Box 13046
Austin, Texas 78711-3046
information@spa.texas.gov

/s/ Angie Creasy